SUPREME COURT, U. S.
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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1925

DELPHI COMMUNITY SCHOOL BUILDING CORPORATION,

Petitioner,

vs.

NORTHEASTERN INSURANCE COMPANY OF HARTFORD, NATIONWIDE MUTUAL INSURANCE COMPANY, AND ALLSTATE INSURANCE COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents, Northeastern Insurance Company of Hartford, Nationwide Mutual Insurance Company, and Allstate Insurance Company, respectfully submit that the Writ of Certiorari sought by Petitioner be denied.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Seventh Circuit and of the United States District Court for the Northern District of Indiana are unreported and appear in the Appendix hereto.

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Seventh Circuit abused its discretion under *Lehman Brothers* v. *Schien*, ... U. S. ....., 40 L. Ed. 2d 215, 94 S. Ct. ..... (1974) when it elected not to certify the interpretation of an Indiana Statute to the Indiana Supreme Court as allowed by Indiana Appellate Rule 15(N) when the question is the effect of an Indiana Statute before an Illinois liquidation proceeding and the claimant asks for a preference over general creditors.

2. Whether or not the affirmance of the District Courts' dismissals in this case conflicts with the indispensable party test set out in *Provident Tradesmens Bank and Trust Co.* v. *Patterson*, 390 U. S. 102, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968) when claimant failed to join the Illinois statutory liquidator for the surety in the Federal Court in Indiana even though the Indiana statute required a joint action against both the surety and the reinsurers.

STATEMENT OF THE CASE

Northeastern Insurance Company of Hartford, Nationwide Mutual Insurance Company, and Allstate Insurance Company ("Reinsurers") were the reinsurers of certain risks undertaken by Home Owners Insurance Company ("Surety"), an Illinois Corporation. Among those risks was a bond for construction work on a high school in Delphi, Indiana, for Petitioner, Delphi Community School Building Corporation ("Delphi"). The Contractor is alleged to have defaulted after part performance and Delphi completed the job at its own expense.

After the Contractor's alleged default, Surety became insolvent and the Illinois Insurance Commissioner instituted liquidation proceedings in the Circuit Court of Sangamon County, Illinois, and that court appointed a statutory liquidator ("Liquidator"). Reinsurers became a party to that proceeding. On

April 8, 1971, that Court issued an Order, which appears in the Appendix at Page A19, wherein the Court enjoined all persons including claimants from bringing or prosecuting claims outside the liquidation proceeding, enjoined interference with the Liquidator's exclusive right to reinsurance proceeds, and further enjoined the Reinsurers from paying amounts to anyone other than the Liquidator. Subsequent to the entry of that Order, on January 18, 1972, Delphi filed a Complaint only against the Reinsurers in the United States District Court for the Northern District of Indiana, Hammond Division at Lafayette.

Delphi has claimed its suit was based upon an Indiana Statute I. C. 1971 27-1-13-6, Ind. Ann. Stat. § 39-4307 (Burns 1965) ("§ 4307") allowing a claimant to bring a joint action against both a surety and its reinsurers. Delphi did not attempt, however, to join the surety, or its successor in interest (the Liquidator) in the suit, even though the statute provides only for joint action, and not a joint or several action.

Delphi claims that such action would not only lie in the absence of the surety (or the Liquidator) as a party but would also give claimants a preference over other general creditors.

The District Court held that the action could not lie solely against the reinsurers and accordingly that the Liquidator, for the Surety, was an indispensable party to the proceedings. Concluding that joinder of the Liquidator was not procedurally possible because of the injunction in the liquidation proceedings in Illinois, the District Court dismissed Delphi's Complaint.

Judge Eschbaugh in the District Court based his decision on the unmistakably clear language of § 4307 enabling the insured to maintain an action against the insurer and Reinsurers *jointly* and requiring a judgment against the insurer in favor of the Insured prior to a recovery against the Reinsurer.

Delphi appealed the decision to the United States Court of Appeals for the Seventh Circuit, where the Court affirmed the District Court's sustaining of the Reinsurers' Motion to Dismiss.

On appeal, Delphi was consolidated with four other causes of action concerning similar claims asserted under § 4307 and similarly dismissed in the several District Courts below.

The Court of Appeals affirmed the dismissal Orders in all cases determining that § 4307 did require joinder and that it created no preference for any appellant.

In its opinion, the Court of Appeals considered the procedural requirement for joinder, and determined that

> "while we agree . . . that Section 4307 accorded them (all claimants) a direct right of action against the insurer jointly with the reinsurers, we do not agree that the Indiana Legislature intended to give them a preference over the general creditors of an insolvent reinsured." Appendix at A8.

The question of preference is, however, moot as to Delphi, because there was no joinder of the Reinsurers in any event.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

Delphi asks for a Writ of Certiorari for three reasons. Two reasons concern the certification of the question of the interpretation of a statute to the Indiana Supreme Court. The other reason is a supposed conflict between the decisions below and this Court's decision in *Provident Tradesmen Bank and Trust Co.* v. *Patterson*, 390 U. S. 102, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968), concerning Rule 19 of the Federal Rules of Civil Procedure ["F. R. C. P. 19(b)"]. Delphi's reliance upon these three reasons is misplaced.

A. The Certification Issue: Certification Is Not Here Appropriate

Delphi seeks to have the Seventh Circuit Court of Appeals reconsider the Certification question in light of the recent decision, *Lehman Brothers* v. *Schien*, ... U. S. ....., 40 L. Ed.

2d 215, 94 S. Ct. ..... (1974). In the alternative, Delphi seeks to have this Court certify the interpretation of the Statute by utilizing the supervisory powers of this Court.

Petitioner's position rests upon an erroneous impression of *Lehman Brothers, supra.* The case held:

1. Certification is not obligatory;

   "We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory." *Lehman Brothers, supra,* at 220.

Unlike *Lehman Brothers, supra,* where there was a question of common law, the present case is a matter of an unconstrued statute which also appears in the New York Insurance Code and is unmistakably clear. McKinneys Consol. Laws, Ch. 28 § 315(1). It reads:

> "[Certain circumstances require an insurer to have] . . . [r]einsurance in a company authorized to transact the fidelity or surety business in this state, provided that such reinsurance is in such form as to enable the obligee or beneficiary to maintain an action thereon *against the company reinsured jointly* with such reinsurer and, upon recovering judgment against such reinsured, to have recovery against such reinsurer for payment to the extent in which it may be liable under such reinsurance and in discharge thereof." I. C. 1971 27-1-13-6, Ind. Stat. Ann. § 39-4307. (Emphasis added.)

2. Failure to certify is discretionary;

   "Its use [certification] in a given case rests in the sole discretion of the federal court." *Lehman Brothers, supra,* at 220.

No abuse of discretion exists when a United States Court of Appeals undertakes to interpret a state's statute, which is sought to be applied in other jurisdictions and which may render a party (Reinsurer) liable to double or multiple liability if the State Courts conflict in results. It cannot be said that interpre-

tation of the statute abused discretion when it was the Petitioner here who was plaintiff in the District Court and there elected to ask the United States Courts to interpret the statute instead of bringing his suit in the Indiana State Court which it was fully able to do. In that regard, Judge Steckler, who dismissed two of the claims which were consolidated with the petitioner's before the Seventh Circuit Court of Appeals, said:

> "This dismissal does not operate as an adjudication upon the merits, and counter-claimants and third-party plaintiffs are free to pursue their claim in the proper forum, i.e., the Illinois liquidation proceedings of Home Owners Insurance Company [brought in the Circuit Court of Sangamon County, Illinois]". Appendix at A4.

3. Certification is an item the Court of Appeals may consider in light of the test laid down in the case;

> "The judgment of the Court of Appeals is vacated and the cases are remanded so that the Court of Appeals *may reconsider* whether the controlling issue of Florida law should be certified to the Florida Supreme Court." *Lehman Brothers, supra,* at 220. (Emphasis added.)

Lehman Brothers, supra, was remanded so that the Court of Appeals could reconsider its holding. It was not mandated to certify the question.

4. The test for considering certification in *Lehman Brothers, supra,* is not that there exists simple doubt about state law, but that (1) the question be novel and (2) the state law be greatly unsettled. Even then certification only should be "considered";

> "We do not suggest that where this is (mere) doubt as to local law and where the certification procedure is available, that resort to it is obligatory. . . . Here it would seem particularly appropriate in view of the novelty of the question and the great unsettlement of Florida Law." *Lehman Brothers, supra,* at 220.

While the instant statute created a case of first impression in the

United States Court of Appeals, it was by no means novel because parallel language is found in the New York Insurance Code. McKinneys Consol. Laws. Ch. 28 § 315(1).

As to great unsettlement, it cannot be said that a clearly worded statute is as appropriately called unsettled law as was Florida common law to be decided on a consensus of the unclear and even conflicting cases as that existed in *Lehman Brothers, supra.*

A review therefore of the *Lehman Brothers* case, *supra,* shows that it is inapplicable to this case and that it militates against certification here.

Justice Rhenquist's concurring opinion in *Lehman Brothers, supra,* is especially clear that certification is to simplify and not to complicate litigation and that it must supplement the judicial effort of the Federal Courts rather than replace it.

> "If a District Court or Court of Appeals believes it can resolve an issue of state law with available research materials already at hand and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed and was not used." *Lehman Brothers, supra,* at 221.

Moreover, in this case the matter would be further complicated by the additional interpretations which are otherwise available to the Illinois Court as to the Indiana interpretation and to the added lack of definition on the matter of full faith and credit of that interpretation by the Illinois Court in light of its own policy and insurance code.

In all respects then, the United States Court of Appeals did not abuse its discretion and to require certification of the statute in the instant case would be an uneconomical effort producing no real benefit of analysis beyond that already available to and exercised by the United States Court of Appeals.

B. The Indispensable Party Issue: The Non-Joinable Statutory Liquidator Is an Indispensable Party to Delphi's Suit and in His Absence Delphi's Claim Was Properly Dismissed

Delphi's final basis for seeking a Writ of Certiorari is the alleged conflict between the decision below dismissing Delphi's claim and this Court's decision in *Provident Tradesman Bank and Trust Co.* v. *Patterson*, 390 U. S. 102, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968). This Court in the *Provident* case, *supra*, remanded the case to the Third Circuit Court of Appeals after its decision to reverse the District Court and dismiss the pending action. The Supreme Court determined that F. R. C. P. 19(b) provided the factors for a decision to dismiss an action when a person absent from the suit who should be joined if feasible could not be joined.

In *Provident, supra*, this Court analyzed the case on the basis of the factors in F. R. C. P. 19(b). Applying those factors, the case at hand would not yield to a conclusion different than that reached by the District and Appeal Courts, that the Liquidator is an "indispensible" party to this action.

F. R. C. P. 19(b) provides the following factors:

1. To what extent a judgment rendered in the person's absence might be prejudicial to him as to those already parties?

2. The extent to which, by protective provisions in the judgment, by shaping relief, or other measures, the prejudice can be lessened or avoided.

3. Whether a judgment rendered in the person's absence will be adequate?

4. Whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.

While it is clear in this case that the Liquidator should be a party under the language, an analysis of this case on the basis of the four (4) interests suggested by *Provident, supra*, in order

to determine if the person was indispensible and the action should be dismissed yields the same result.

Provident, supra, suggested that a Court consider and balance:

1. The plaintiff's interest in having a forum.

2. The defendants' desire to avoid multiple litigation or inconsistent relief as sole responsibility for a liability he shares with another.

3. The interest of the outsider whom it would have been desirable to join.

4. The interest of the Courts and the public in complete, consistent and efficient settlement of controversies.

In the instant case all of these considerations weigh in favor of dismissal if joinder cannot be accomplished.

With respect to Plaintiff's interest in having a forum, doubtless Plaintiff herein is anxious to have it's day in Court in order that the merits of its claim can be determined. Nevertheless plaintiff had and has alternative fora in Illinois as well as Indiana.

As Judge Steckler observed in his opinion in the District Court, dismissal here does not foreclose plaintiff from its only remedy, it merely relegates it to the liquidation proceeding of Home Owners in the Circuit Court of Sangamon County, Illinois. Appendix at A4.

The concern for multiple litigation as expressed in ***Provident, supra,*** strikes at the heart of this case. Defendants certainly wish to avoid the multiple litigation and possibly inconsistent relief which they face with the Delphi District Court action and similar suits. Such multiplicity would be both expensive and hazardous. Reinsurers are already operating under an injunction from the Court entertaining the Home Owners liquidation proceeding, enjoining the paying of all claims to anyone other than the Liquidator. Moreover, no determination as to the viability to Delphi's claim against Home Owners has been made, and yet the Reinsurers face a potential liability on that claim in the District Court without Home Owners Liquidator present in this suit.

Likewise this Court's concern for the interest of the third party in *Provident, supra,* is represented by the Liquidator here. As the successor of Home Owners he is clearly jeopardized by multiple litigation or his absence from such and his interests are actually the interests of all the creditors. While a liquidation proceeding is pending in which claims are being submitted and their validity determined, the Liquidator is being deluged with suits similar to that of Delphi in the District Court in which the Liquidator must either participate or actively oversee the reinsurers participation. Such activity on the part of the Liquidator must only delay the liquidation process and the orderly termination of the company's affairs. Furthermore, requiring the Liquidator to divert attention and energies to defend this type of claim in a federal District Court proceeding further diminishes the already insufficient assets of the defunct Home Owners Insurance Company.

As in *Provident, supra,* the interest in consistent and efficient results was accommodated here by the decision of the Court of Appeals. The interests of the Courts and the public in the policy of economy, fairness and convenience in judicial liquidation proceedings was applied in the present case and the parties relegated to the liquidation proceeding consistent with the law of the Seventh Circuit which has been well settled as to this question by *Thacher* v. *H. C. Baldwin Agency, Inc.,* 283 F. 2d 857 (7th Cir. 1960) and *Field* v. *Fidelity General Insurance Company,* 454 F. 2d 682 (7th Cir. 1971) wherein all cases relegated all claimants to the liquidation proceedings in the interest of preventing double or multiple losses to an asset holder and the substantial litigation expenses of such suits.

Although a statutory liquidation proceeding is pending in Illinois, Delphi has chosen to assert its claim in a local District Court and thereafter utilize the federal appeal process. When a specific statutorily created forum is available, such an additional litigation burden on the federal Courts seems entirely unnecessary. The public certainly cannot benefit by the decision

by Delphi to proceed outside the statutory liquidation proceeding. Not only are the federal Courts needlessly burdened to the detriment of other legal matters there pending, but the limited assets of the Liquidator are being dissipated in participating in and overseeing such extra-liquidation proceeding actions. Claimants in that liquidation must stand by as the already insufficient assets are diverted from paying claims and further diminished in defending suits by various parties in their local district courts.

The conclusion that the Liquidator is an indispensible party and that plaintiff's claim should be dismissed could be otherwise if Delphi had no other forum. Yet when Delphi merely declines to participate in the statutorily established liquidation proceeding and seeks to avail itself to its local District Court, the F. R. C. P. 19(b) factors as applied to the situation here presented can lead only to the conclusion that the Liquidator is an indispensible party and Delphi's claim should be dismissed while Delphi can still avail itself to the liquidation proceeding pending in the Circuit Court of Sangamon County, Illinois.

CONCLUSION

Delphi's Petition for a Writ of Certiorari should be denied because no valid basis for the issuance of such Writ has been established.

While Delphi seeks the Writ in order to have the question of the interpretation certified to the Indiana Supreme Court, Respondents have demonstrated that the Court of Appeals did not abuse its discretion in not certifying the interpretation of the unmistakably worded § 4307 to the Indiana Court. This Court's statement on certification in *Lehman Brothers, supra,* does not require a different result as Petitioner contends. The decision to certify a question to a State Court is for the discretion of the Federal Court only when the state question is unclear and greatly unsettled. The Court of Appeals therefore did not abuse

its discretion in refusing to certify the interpretation of § 4307 to the State Court when Delphi had chosen the federal forum, had sued only the reinsurers, and when the requirement of § 4307 that an action against the insurer and reinsurers *jointly* is readily clear.

Delphi claims that the dismissal for the lack of the Liquidator as an indispensible party was error because it conflicts with *Provident, supra.* The claim is incorrect because there was no error and the dismissal did not conflict with *Provident, supra.* Every pragmatic application of F. R. C. P. 19(b) and of *Provident, supra,* requires affirmance of the dismissal to protect reinsurers from multiple suits and inconsistent results, to conserve the insolvent estate, to protect the general creditors, and to avoid unnecessary litigation. Consistent with that policy the Court of Appeals correctly applied § 4307 to specifically mandate that an action by an insured shall be instituted and maintained against the insurer and reinsurers jointly, and thus makes the insurer or its successor indispensible.

Consequently, the District Court properly dismissed Delphi's claim, the Court of Appeals properly affirmed that dismissal, and Delphi's Petition for a Writ of Certiorari is properly subject to denial by this Court.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 25, 1974.

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. JOHN PAUL STEVENS, *Circuit Judge*
HON. ROBERT A. GRANT, *Senior District Judge**

DELPHI COMMUNITY SCHOOL BUILDING CORP.,
Plaintiff-Appellant,

No. 73-1070 *vs.*

NORTHEASTERN INSURANCE COMPANY OF HARTFORD, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

No. 72 L 2

JESSE E. ESCHBACH,
Judge.

ORDER

On consideration of the petition of the appellant, Delphi Community School Building Corporation, for a rehearing by the Court in the above-entitled appeal, and no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing,

It Is Ordered that the petition of the appellant for a rehearing in the above-entitled appeal be, and the same is hereby denied.

* Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit

September Term, 1973 — January Session, 1974

No. 73-1049

CUMMINGS WHOLESALE ELECTRIC CO., INC.,
Plaintiff-Appellant,

vs.

HOME OWNERS INSURANCE COMPANY, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. IP 70 C 669

JAMES E. NOLAND, *Judge.*

Nos. 73-1061, 73-1062

JAMES BAYLOR,
Plaintiff and Counter-Defendant-Appellee,

vs.

OTTO ELECTRIC COMPANY, INC., et al.,
Defendants.

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.

Nos. IP 70 C 195
IP 70 C 201

WILLIAM E. STECKLER, *Judge.*

No. 73-1070

DELPHI COMMUNITY SCHOOL BUILDING CORP.,
Plaintiff-Appellant,

vs.

NORTHEASTERN INSURANCE COMPANY OF HARTFORD, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

No. 72 L 2

JESSE E. ESCHBACH, *Judge.*

Heard January 9, 1974—Decided February 21, 1974

Before CUMMINGS and STEVENS, *Circuit Judges,* and GRANT, *Senior District Judge.**

CUMMINGS, *Circuit Judge.* These appeals involve common issues concerning plaintiffs' rights against the reinsurers of the insolvent Home Owners Insurance Company, which had issued certain surety bonds in Indiana.

In No. 73-1049, plaintiff Cummings Electric furnished more than $120,000 worth of materials to Otto Electric Company, which became insolvent. Home Owners had written surety bonds for Otto Electric. Home Owners in turn had reinsurance agreements with the three defendant reinsurers. Home Owners also became insolvent and was undergoing liquidation in Illinois. Plaintiff obtained a default judgment against Home Owners on August 27, 1971. Through negotiations with its liquidator, the default judgment was vacated and a consent decree filed *nunc pro tunc* as of April 14, 1972, against the liquidator. Plaintiff filed an amended complaint on April 17, 1972, to join the defendant reinsurers who had been ceded portions of Home Owners' risks on the surety bonds. Judge Noland granted the reinsurers' and liquidators' motions to dismiss the amended complaint without prejudice in an order not containing any reasons for the dismissal.

In Nos. 73-1061 and 1062, two Indiana public school building corporations filed counterclaims against Home Owners. They were obligees on 1969 performance bonds securing the completion of electrical work to be done by Otto Electric on two new public high school buildings in Indiana. These counterclaims sought the recovery of all costs and expenses incurred by the schools in completing the electrical work for their high school buildings following the default of Otto Electric. On December 17, 1971, the defendant school building corporations filed their amended supplemental counterclaim seeking judgment against the three reinsurance companies and the liquidator

* Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

of Home Owners. In his two orders dismissing the counterclaimants' actions without prejudice, Judge Steckler explained:

> "This dismissal does not operate as an adjudication upon the merits, and Counter-Claimants and Third-Party Plaintiffs are free to pursue their claim in the proper forum, *i.e.*, the Illinois liquidation proceedings of Home Owners Insurance Company [brought in the Circuit Court of Sangamon County, Illinois]."[1]

In No. 73-1070, another Indiana public school building corporation entered into a contract with Otto Electric Company for work to be performed in constructing Delphi Community High School. Otto Electric entered into a performance bond and labor and materials bond with Home Owners as surety for $344,888. After partial performance Otto Electric defaulted and plaintiff expended $176,146.70 to complete the unperformed work. Plaintiff sued the reinsurers without joining the liquidator of Home Owners. In an unreported opinion granting the reinsurers' motion to dismiss, Judge Eschbach held that the liquidator of Home Owners was an indispensable party and could not be joined because of the April 8, 1971, injunction of the Circuit Court of Sangamon County, Illinois, restraining all persons with claims against Home Owners from asserting any claim against the liquidator except in the Illinois liquidation proceedings. As in Nos. 73-1061 and 1062, the court stated that plaintiff was free to pursue its claim in the Illinois liquidation proceedings of Home Owners.

These various appeals involve the proper construction to be given to Ind. Code 1971, § 27-1-13-6 (Burns § 39,4307), which was enacted as Section 175 of the 1935 Indiana Insurance Law and provides as follows:

> "Limitation of risks.—No company organized to make any kind or kinds of insurance included in class II and

1. Judge Dillin dismissed similar counterclaims of two other Indiana public school building corporations on comity grounds in Nos. IP 70-C-202 and 218 (S. D. Ind. October 30 and 31, 1973).

class III of section fifty-nine [§ 39-3501] shall take, on any one [1] risk of whatever nature, a sum exceeding one-tenth [1/10] part of its paid-up capital, surplus, and contingent reserves, if any, if a stock company or one-tenth [1/10] part of its surplus and contingent reserves, if any, if other than a stock company. No portion of any such risk or hazard which shall have been reinsured in a corporation authorized to do insurance business in this state shall be included in determining the limitation of risk prescribed in this section: Provided, That this section shall not apply to marine insurances, or to companies organized to make life insurance.

"No stock or mutual insurance company transacting fidelity or surety business in this state shall expose itself to any loss on any one [1] fidelity or surety risk or hazard in an amount exceeding ten per cent [10%] of its capital, surplus and contingent reserves, if any, unless it shall be protected in excess of that amount by: (a) Reinsurance in a company authorized to transact the fidelity or surety business in this state, *provided that such reinsurance is in such form as to enable the obligee or beneficiary to maintain an action thereon against the company reinsured jointly with such reinsurer and, upon recovering judgment against such reinsured, to have recovery against such reinsurer for payment to the extent in which it may be liable under such reinsurance and in discharge thereof;* or (b) the cosuretyship of such a company similarly authorized; or (c) by deposit with it in pledge or conveyance to it in trust for its protection of property; or (d) by conveyance or mortgage for its protection; or (e) in case a suretyship obligation was made on behalf or on account of a fiduciary holding property in a trust capacity, by deposit or other disposition of a portion of the property so held in trust that no future sale, mortgage, pledge or other disposition can be made thereof without the consent of such company; except by decree or order of a court of competent jurisdiction: Provided: (1) That such a company may execute what are known as transportation or warehousing bonds for United States internal revenue taxes to an amount equal to fifty per cent [50%] of its capital, surplus and contingent reserves, if any; (2) that,

> when the penalty of the suretyship obligation exceeds the amount of a judgment described therein as appealed from and thereby secured, or exceeds the amount of the subject-matter in controversy or of the estate in the hands of the fiduciary for the performance of whose duties it is conditioned, the bond may be executed if the actual amount of the judgment or the subject-matter in controversy or estate not subject to supervision or control of the surety is not in excess of such limitation; and (3) that, when the penalty of the suretyship obligation executed for the performance of a contract exceeds the contract price, the latter shall be taken as the basis for estimating the limit of risk within the meaning of this section. No such company shall, anything to the contrary in this section notwithstanding, execute suretyship obligations guaranteeing the deposits of any single financial institution in an aggregate amount in excess of ten per cent [10%] of the capital, surplus and contingent reserves, if any, of such corporate surety, unless it shall be protected in excess of that amount by credits in accordance with subdivisions (a), (b), (c) or (d) of this paragraph." (Italics supplied.)

This statute was apparently modeled on a comparable New York statute (Laws of 1920, ch 563, § 3, now as amended McKinney's Consol. Laws, ch. 28, §§ 47, 315). However, we have found no cases or legislative history under either statute to illuminate the meaning of the critical, italicized proviso.

The Indiana legislature required that these reinsurance policies be "in such form" as to permit the obligee or beneficiary to sue the reinsured and reinsurer jointly. Paragraph 14 of the General Reinsurance Agreement sufficiently satisfies this requirement.[2] Because of the mandate of Section 4307, we reject the reinsurer's argument that Paragraph 14 is inconsistent with Article

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2. Paragraph 14 provides in part:
"This Agreement shall be deemed to comply with any law, whenever applicable, which provides that the Obligee or other beneficiary of the Bond shall have the right to maintain an action on such an agreement against the Reinsurer."

XIV of the Separate Reinsurance Agreements[3] and hence was not incorporated therein by Article XI thereof.[4] This does not require a strained construction of Article XIV, since it only relates to payments during insolvency, and as will be seen, Section 4307 grants no preference and authorizes no direct action after liquidation proceedings begin. Because no part of any of the agreements other than Paragraph 14 of the General Agreement gives the insured any rights against the reinsurers, we hold that these agreements provide such rights only to the extent necessary to comply minimally with Section 4307.

The various insured claimants in these cases were given a direct right of action against the reinsurers by virtue of Section 4307 and Paragraph 14 of the General Reinsurance Agreement. While each case presents different procedural problems relating to whether or not the insurer and reinsurers were sued "jointly," we conclude that at least in Nos. 73-1061 and 1062 the procedural requirements of Section 4307 were satisfied. It therefore becomes necessary to decide whether the right to sue the reinsurers directly survived the insolvency of Home Owners and gave claimants a preference in the reinsurance proceeds over the general creditors.

Under common law principles followed in Indiana, obligees such as these claimants have no rights to reinsurance proceeds unless the insurance agreements so provide. Therefore, upon the insolvency of the insurer, the proceeds of the reinsurance are

3. Article XIV of each Separate Reinsurance Agreement (with an immaterial variation) provides in part:

> "In the event of the insolvency of the Company, the Reinsurance under this Agreement shall be payable by the Reinsurer to the Company, or to its liquidator, receiver or statutory successor * * *."

4. Article XI of each Separate Reinsurance Agreement provides:

> "All reinsurance effected in accordance with the provisions of this Agreement shall be subject to the terms and conditions of the General Reinsurance Agreement (revised February 1, 1950, and as amended from time to time) of the Surety Association of America, except to the extent that said Agreement is inconsistent with the provisions hereof."

assets to be distributed among the general creditors of the insured. *Florida* ex rel. *O'Malley* v. *Department of Insurance*, ... Ind. App. ....., 291 N. E. 2d 907, 913 (1973); *United States* v. *Federal Surety Co.*, 73 F. 2d 964, 967 (4th Cir. 1934), certiorari denied, 294 U. S. 711. We turn to Section 4307 to see if the contractual incorporation of that statute changes the common law result.

While we agree with claimants that Section 4307 accorded them a direct right of action against the insurer jointly with the reinsurers, we do not agree that the Indiana Legislature intended to give them a preference over the general creditors of an insolvent reinsured. When the General Assembly enacted the 1935 Indiana Insurance Law, it disfavored granting preferences in assets of insolvent insurance companies. Thus Section 37(b) of the 1935 law, now Ind. Code § 27-1-4-9 (Burns § 39-3409 (b)), provides that an Indiana liquidation court may issue any orders necessary to prevent the obtaining of any preferences against any part of the assets of an insolvent insurance company. Similarly, Section 38, now Ind. Code § 27-1-4-10 (Burns § 39-3410), provides that if an insurance company is in liquidation in Indiana, no suit can be maintained against the company outside the liquidation proceedings. Since Section 4307 specifies that the reinsurer be sued jointly with the insurer, Section 3410 would prevent any suit under an agreement minimally complying with Section 4307, once Indiana liquidation proceedings had begun.[5] We do not believe a different result was intended when the liquidation proceeding takes place outside Indiana.

5. In the parallel New York statute, this result was avoided by Laws of 1939, ch. 882, § 315, which, *inter alia*, added the language italicized below. McKinney's Consol. Law, ch. 28, § 315(1)(a) provides:

> "1. In applying the limitation of section forty-seven to fidelity and surety risks, the net amount of exposure on any one fidelity or surety risk shall, except as provided in subsection four, be deemed within the limit of ten per cent if such company is protected in excess of that amount by:
>
> "(a) reinsurance, in a company authorized to do such business in this state, which is in such form as to enable the obligee

When the legislature intended to grant a preference, it did so explicitly, as in Section 43 of the 1935 Act, now Ind. Code § 27-1-4-15 (Burns § 39-3415), which provides that certain wage claims "shall be paid prior to the payment of every other debt or claim * * *." We conclude that if the Indiana Insurance Law were intended to give claimants a preference in the assets of an insolvent insurance company, the statutory expression would have been equally explicit. Our determination that there is no preference leads to the conclusion that the direct cause of action does not survive the commencement of liquidation proceedings. It would obviously be impossible for the district courts in these cases to determine the share to which each claimant would be entitled if it participated on a non-preferential basis in the Illinois liquidation proceeding. Conversely, since claimants are not entitled to a preference, they will not be prejudiced if the Illinois court refuses to apply Indiana law.

In arguing for preferences, counterclaimants in Nos. 73-1061 and 1062 have relied on *First National Bank of Kansas City* v. *Higgins*, 357 S. W. 2d 139 (Mo. 1962). However, the Supreme Court of Missouri recognized the general rule that "the liability of the insuring company is solely to the reinsured company, or to its receiver, in the event of its insolvency." 357 S. W. 2d at 143. The court held that although the reinsured had become insolvent, the reinsurer was directly liable to the injured plaintiff because of a provision in the reinsurance contract that the "liability of [reinsurer] shall follow that of [reinsured] in every case and be subject in all respects to all the general and special stipulations, clauses, waivers and modifications of [reinsured's] policy, binder, or other undertaking and any endorsements

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or beneficiary to maintain an action thereon against the ceding insurer jointly with the assuming insurer or, *where the commencement or prosecution of actions against the ceding insurer has been enjoined by any court of competent jurisdiction or any justice or judge thereof, against the assuming insurer alone,* and to have recovery against such assuming insurer for its share of the liability thereunder and in discharge thereof; * * *." (Emphasis supplied.)

thereon * * *." 357 S. W. 2d at 144. This clause was held to incorporate a clause of the reinsured's auto liability policy which provided that a party who had obtained a tort judgment against the insured could sue the insurer directly. In the present case, neither the General nor Separate Reinsurance Agreements contains such an incorporation clause, so that *Higgins* is inapt. For similar reasons, *Federoff* v. *Ewing*, 386 Mich. 474, 192 N. W. 2d 242 (1971), vacating 29 Mich. App. 1, 185 N. W. 2d 79 (1970), is inapplicable.

This construction does not leave Section 4307 without a purpose. Taken as a whole, the Section is designed to protect insurance companies against insolvency. It prevents insurance companies from committing more than 10% of their assets to any one risk. Where there is a chance that the insurer will be unable to pay a large claim, the insured has an incentive to join the reinsurer as a defendant in any suit. The direct action proviso thus reduces the chances that the insurer will be forced into insolvency during the interval between the time judgment is rendered against it and the time it can collect from the reinsurer. If the insurer nevertheless becomes insolvent, continued operation of the direct action proviso would lead to a multiplicity of litigation and a preference for large risks. Since multiple litigation would waste the assets of the insolvent estate, and insureds with large risks have more incentive to protect themselves by investigating the financial status of the insurer before accepting it as surety, we are confident that the legislature did not intend to give them a direct cause of action to secure preferences from the reinsurers.

What we have said applies to all four cases. Because the incorporation of Section 4307 into the reinsurance agreements creates no preference and no cause of action which survived the insolvency of Home Owners, none of the insured can collect on their claims except through the Illinois liquidation proceedings. It is therefore unnecessary to decide the many other issues raised in the briefs.

The four dismissal orders are affirmed.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Indiana

Hammond Division at Lafayette

DELPHI COMMUNITY SCHOOL BUILDING CORPORATION,
Plaintiff,

vs.

NORTHEASTERN INSURANCE COMPANY OF HARTFORD, NATIONWIDE MUTUAL INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY,
Defendants.

Civil No. 72 L 2

MEMORANDUM OF DECISION AND ORDER

Defendants have moved to dismiss the above-captioned matter for failure to state a claim upon which relief can be granted. This court has concluded that the motion shall be granted but on grounds other than those strictly asserted by the defendants. An essential prerequisite to plaintiff's action against these defendants is the presence of an indispensable party, whose joinder should not be compelled, and therefore plaintiff's cause must be dismissed pursuant to *Fed. R. Civ. P.* 12(b)(6) and 19(b).

Plaintiff has alleged in its complaint that on February 29, 1968 it entered into a contract with Otto Electric Company, Inc., for electrical work to be performed on the Delphi Community High School. On that same date, Otto Electric Company entered into a performance bond and a labor and materials bond with Homeowners Insurance Company, Inc. (hereinafter Homeowners) as Surety. On February 11, 1970 Otto Electric defaulted on its contracts. Homeowners is now in liquidation pursuant to the laws of the State of Illinois. Pursuant to certain

reinsurance treaties, a portion of the risk undertaken by Homeowners on the bonds written for the Otto Electric Company, as was true of most if not all bonds Homeowners would underwrite, was ceded to the defendants herein as reinsurers. Plaintiff in this action seeks to proceed directly against the defendant reinsurers for the obligation on the bond.

Defendants in their motion, have contended, inter alia, that plaintiff may not proceed against them directly, but that plaintiff may only proceed against them jointly with the reinsured, Homeowners. Defendants further submit that this court should accord full faith and credit to an order of the Sangamon County, Illinois, Circuit Court declaring the reinsurance proceeds an asset of the court-appointed Liquidator of Homeowners and precluding the payment of such assets to any party but the Liquidator. Plaintiff, in opposition to this motion, has argued that because of a provision in the reinsurance agreements coupled with IND. ANN. STAT. § 39-4307 (Burns Repl. 1965), they may proceed directly against these defendants, singly. Plaintiff contends there is no attempt being made here to sue the Illinois statutory liquidator or to interfere in any way with the assets or the orderly administration of Homeowners' estate.

This court must proceed from the proposition that ordinarily reinsurance is one of indemnity only, by the reinsurer (defendants) to the reinsured (Homeowners), and as a general rule the liability of the reinsurer is solely to the reinsured. *See, e.g., Morris and Company* v. *Skandinavia Ins. Co.*, 279 U. S. 405, 408 (1929); *Bruckner-Mitchell* v. *Sun Indemnity Co. of New York*, 82 F. 2d 434, 445 (D. C. Cir. 1936), *cert. denied*, 298 U. S. 677 (1936); *United States* v. *Federal Surety Co.*, 72 F. 2d 964, 967 (4th Cir. 1934), *cert. denied*, 294 U. S. 711 (1935); *Federal Life Ins. Co.* v. *Barnett*, 71 Ind. App. 613, 125 N. E. 522 (1919); *The Eagle Ins. Co.* v. *The Lafayette Ins. Co.*, 9 Ind. 443 (1857). However, under a reinsurance agreement, recovery may be had by the original insured (plaintiff) against the reinsurer if the original insured can show that the contract

was made for his direct, or primary benefit, but such a contract must be strictly construed in favor of the person against whom such liability is asserted. *Sacks* v. *Ohio Nat'l Life Ins. Co.*, 148 F. 2d 128, 131 (7th Cir. 1945), *cert. denied*, 312 U. S. 706 (1941). *See also Kletstad* v. *American Cent. Ins. Co.*, 207 F. 2d 288 (7th Cir. 1953); *Couch* INSURANCE § 80, 67 (1968).

Plaintiff submits that the reinsurance agreements here provide for a direct suit against the reinsurers. Provision 14 of the General Reinsurance agreement provides that:

> [T]his agreement shall be deemed to comply with any law, whenever applicable which provides that the obligee or other beneficiary of the Bond shall have the right to maintain an action on such an agreement against the Reinsurer.

INDIANA ANN. STAT. § 39-4307 (Burns 1965 Repl.) (I. C. 27-1-13-6) provides in pertinent part:

> No stock or mutual insurance company transacting fidelity or surety business in this state shall expose itself to any loss on any one (1) fidelity or surety risk or hazard in an amount exceeding ten per cent (10%) of its capital, surplus and contingent reserves, [which Homeowners did in this case] unless it shall be protected in excess of that amount by: (a) Reinsurance in a company authorized to transact the fidelity or surety business in this state, *provided that such reinsurance is in such form as to enable the obligee or beneficiary to maintain an action thereon against the company reinsured jointly with such reinsurer* and, upon recovering judgment against such reinsured, to have recovery against such reinsurer for payment to the extent in which it may be liable under such reinsurance and in discharge thereof. [Court's emphasis]

Assuming as plaintiff contends that § 14 of the General Reinsurance Agreement controls over other somewhat conflicting provisions of the specific contracts, this provision merely provides that the contract will be deemed to *comply* with state law that provides for direct action against the reinsurer. Consider-

ing, then, that ordinarily an insured has no right of action against the reinsurer and the contract must be strictly construed in favor of the person against whom liability is asserted, it becomes necessary to analyze what would be *compliance* with IND. ANN. STAT. § 39-4307, *supra.*

The Indiana statute in question clearly does contemplate an action by the insured against the reinsurer, but it is equally clear from the language of that statute that such action is to be *jointly* with the company reinsured. This conclusion is supported not only by the language of the statute itself, but by the recognition in the statute that judgment must first be had by the insured against the reinsured, and then only may the insured recover against such reinsurer. This recognition reaffirms the original proposition that a contract of reinsurance is basically one of indemnity, and the reinsurer's liability only results from a loss incurred by the reinsured. Moreover, Provision No. 4 of the General Reinsurance Agreement provides that the "reinsurer shall become liable for its share . . . of all loss, interest, costs, and expenses for which the Reinsured *shall become liable in connection with the Bond. . . .*"

It is difficult to perceive how the reinsurer here can become liable on the Bond when there has been no judicial or other determination that the reinsured is liable. Neither the statute in question nor the provisions of the reinsurance agreement transform this agreement among the parties from one of indemnity to one of guaranty. The statute strictly construed merely modifies the indemnity relationship so as to allow the insured to have "recovery against such reinsurer for payment to the extent in which it may be liable" under the reinsurance agreement.

The statutory successor to the reinsured, Homeowners, for the purpose of the liquidation proceedings in Illinois is James Baylor, Director of Insurance for the State of Illinois (hereinafter referred to as Liquidator). Generally, upon the insolvency of the reinsured, as is the case here, the proceeds of the reinsurance agreements are considered assets of the Liquidator for the

use of general creditors. *United States* v. *Federal Surety Co., supra* at 967. Moreover, the Sangamon County, Illinois, Circuit Court in its order of April 8, 1971 declared that the "Liquidator has the right, title and interest in all funds receivable under treaties and agreements of reinsurance." It would appear, however, that IND. ANN. STAT. § 39-4307, *supra*, does, in effect, attempt to confer a preference upon the insured, by allowing the insured to have recovery against the reinsurer jointly with the reinsured to the extent the reinsurer may be liable under the reinsurance agreement. Plaintiff has not shown, however, that such a preference, if it exists, would not be respected by the Illinois liquidator. In fact, plaintiff directs this court's attention to the case of *People* v. *Chicago Lloyds*, 391 Ill. 492, 63 N. E. 2d 479 (1945), *rev'd on other grounds*, 329 U. S. 545 (1945), where the Illinois Supreme Court observed that if a statute of another state granted a preference to creditors residing in that state, such a statute would have been respected and deferred to by the Illinois liquidator. *Id.* at 486. The resolution of the issue concerning the extent of the rights of the plaintiff-insured, in these reinsurance proceeds, in the absence of the Liquidator, would obviously be prejudicial to the rights of the Liquidator, and therefore the remaining creditors of Homeowners. This court has concluded that under the reinsurance agreement and statute in question, a necessary prerequisite to an action against the defendant reinsurers is the joining of the statutory successor of the reinsured, viz., James Baylor, as Liquidator of Homeowners.

Having concluded that the Liquidator is an indispensable party to this action, the question becomes whether he can be joined as a defendant in light of the injunction of the Sangamon County, Illinois, Circuit Court which purported to restrain all claimants, policyholders and creditors of Homeowners from asserting any claim against the Liquidator except in the Illinois liquidation proceedings.

This court would agree with plaintiff's general statement concerning the force of the Illinois injunction that:

> "An injunction against the prosecution of an action in another state acts upon the parties rather than the court, and, therefore, the court in which the enjoined action is pending has the power to proceed with the litigation despite the injunction. Nevertheless that court may take cognizance of the judicial processes of another state, and recognize an injunction issued by the court of another state as a matter of comity. If a court stays pending proceedings or abates an action by reason of a foreign antisuit injunction, it does so solely upon the ground of comity, and not because the Federal Constitution requires it so to act." (Citations omitted.) 74 A. L. R. 2d 814, *Foreign Antisuit Injunctions* at 830-831.

It would seem clear to this court, however, that, at least in the Seventh Circuit, a second court having acquired jurisdiction subsequent to the initiation of a statutory liquidation proceeding of another state, should defer to those proceedings on principles of comity. *See, e.g., Field* v. *Fidelity General Insurance Company*, 454 F. 2d 682 (7th Cir. 1971); *Thacher* v. *H. C. Baldwin Agency, Inc.*, 283 F. 2d 857 (7th Cir. 1960); *Janak* v. *Allstate Insurance Company*, 319 F. Supp. 215 (D. C. Wis. 1970).

In *Field* v. *Fidelity General Insurance Company, supra* at 685, the United States Court of Appeals for the Seventh Circuit stated:

> Courts have noted distinctions between a receivership and a statutory liquidation created by the state of incorporation, where, as here, title to rights of action vest in the liquidator under the supervision of a court. Particularly in the later situation the courts have emphasized the duty of a second court not to interfere with the possession of assets and the jurisdiction of the court in charge.

Moreover, in both *Thacher* v. *H. C. Baldwin Agency, Inc., supra*, and *Janak* v. *Allstate Insurance Company, supra*, the

courts have dismissed claims against the statutory liquidator, where such claims had been stayed by a state court except in the liquidation proceedings. Indeed, in *Thacher, supra,* the statutory liquidator, himself, had been the plaintiff and the claims asserted against him had been by way of set-offs and counterclaims, yet the court deferred those claims to the statutory liquidation proceeding. Furthermore, it would appear that the policy of Indiana is in accord with that expressed by the courts of the Seventh Circuit. In *O'Malley* v. *Hankins,* 207 Ind. 589, 194 N. E. 166 (1935) the Supreme Court of Indiana stated that:

> If the Courts of Indiana may equitably take possession of the assets of a company within Indiana for the benefit of the Indiana creditors, why cannot the Courts of Missouri or the Insurance Commissioner of that state, take possession of the assets of a company (which we assume to be the principal assets) located in the State of Missouri for the benefit of the Missouri policyholders and creditors? Such a procedure would manifestly work an injustice upon and injury to Indiana policyholders and creditors. *Id.* at 77.

There are also numerous sound policy considerations which militate in favor of this court's deferral to the liquidation proceeding. Requiring the statutory liquidator to travel to numerous states to appear and defend actions against Homeowners would obviously substantially increase the costs of administering the remaining assets, which in turn decreases the amount available for distribution among creditors. If this court were to order the Liquidator to forego his interest in the reinsurance proceeds, he would be exposed to the possibility of inconsistent judgments, ordering him to pay out the proceeds to those other than the insured. Finally, plaintiff has not shown that deferral of its claim to the liquidation proceeding would greatly prejudice it. *People* v. *Chicago Lloyds, supra,* cited by plaintiff would indicate that the policy of the courts of Illinois would recognize plaintiff's preference, if it exists. In fact, it would appear

that plaintiff would suffer little hardship if it were forced to adjudicate its claim in the Illinois proceeding. ILLINOIS REV. STAT. 1969 ch. 73, § 821 provides that one seeking to assert his claim in a statutory liquidation proceeding need only file:

> (1) A proof of claim [consisting] of a statement under oath, in writing, signed by the claimant, setting forth the claim, the consideration therefor, . . . and that the sum claimed is justly owing from the company to the claimant.

Such a procedure surely is not a great inconvenience to this plaintiff.

Accordingly, this court having concluded that James Baylor, Director of Insurance of the State of Illinois, as Liquidator of Homeowners Insurance Company, is an indispensable party to this action, and that he cannot be made a party hereto, defendant's motion to dismiss is hereby granted pursuant to *Fed. R. Civ. P.* 12(b)(7).

Pursuant to *Fed. R. Civ. P.* 41(b), this dismissal does not operate as an adjudication upon the merits, and plaintiff is free to pursue its claim in the proper forum, *i.e.*, the Illinois liquidation proceedings of Homeowners Insurance Company.

Entered this 6th day of October, 1972.

/s/ JESSE E. ESCHBACH,
United States District Judge.

STATE OF ILLINOIS }
COUNTY OF SANGAMON } ss

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
Sangamon County, Illinois

PEOPLE EX REL. JAMES BAYLOR, DIRECTOR OF INSURANCE OF THE STATE OF ILLINOIS,
Plaintiff,

vs.

HOME OWNERS INSURANCE COMPANY, AN ILLINOIS CORPORATION,
Defendant.

No. 222-71

ORDER

This cause coming on for hearing on the Complaint of the People, ex rel. James Baylor, Director of Insurance, the Court being fully advised in the permises and having considered the Complaint filed herewith, finds as follows:

1) That it has jurisdiction of a subject matter of this action and the parties hereto, and that the allegations contained in the Complaint are true.

2) That Home Owners Insurance Company is a Stock Casualty Company existing under and by virtue of the Illinois Insurance Code (Ill. Rev. Stat. 1969, Ch. 73, Par. 613 et seq.).

3) That on or about February 5, 1971, an examination of the condition of Home Owners Insurance Company was commenced at the offices of said company to ascertain the condition of the company.

4) That as a result of said examination this Court finds Home Owners Insurance Company to be insolvent and that its further transaction of business would be hazardous to its policyholders, its creditors or to the general public.

5) That a majority of the Board of Directors of Home Owners Insurance Company have consented to the entry of a Liquidation Order in the Circuit Court of Sangamon County and did for themselves and on behalf of said company waive notice, service of process, right to hearing and enter their appearances in any such proceeding.

6) That the aforesaid insolvency, hazardous condition, and consent by a majority of the Board of Directors of Home Owners Insurance Company are sufficient grounds for the liquidation of said company pursuant to Paragraphs 1, 5 and 12 of Section 188 of the Illinois Insurance Code (Ill. Rev. Stat. 1969, Ch. 73, Par. 800).

IT IS HEREBY ORDERED, ADJUSTED AND DECREED:

(a) That James Baylor, Director of Insurance of the State of Illinois and his successors in office, hereinafter referred to as "Director", be and they are hereby authorized and directed to take possession of the property of Home Owners Insurance Company, as Liquidator, and to liquidate the business and affairs of Home Owners Insurance Company, an Illinois corporation, pursuant to the provisions of Article XIII of the Illinois Insurance Code (Ill. Rev. Stat. 1969, Ch. 73, Par. 800 through 833), and that said Director be and he is hereby vested as Liquidator with title to all property, contracts and rights of action of Home Owners Insurance Company, and he is hereby directed to deal with the property and business of Home Owners Insurance Company in his name as Director of Insurance of the State of Illinois.

(b) That the Liquidator has the right, title and interest in all funds recoverable under treaties and agreements of reinsurance heretofore entered into by Home Owners Insurance Company as the ceding insurer and all reinsurance companies involved with Home Owners Insurance Company be and are hereby restrained from making any settlements with any claimant other than the Liquidator.

(c) That the officers, directors, agents and employees and all persons of Home Owners Insurance Company be and are hereby enjoined from the further transaction of business or dealing with or disposing of the property or assets of Home Owners Insurance Company, or doing or permitting to be done any action which might waste the assets or allow or suffer the obtaining of judgments or preferences or other liens or the making of any levy against Home Owners Insurance Company while said company is in the possession and control of the Director of Insurance and from interfering with the possession and control of the property of Home Owners Insurance Company by the Director of Insurance.

(d) That the officers, directors, agents and employees of Home Owners Insurance Company and all other persons be and

are hereby enjoined and restrained from bringing or further prosecuting any action at law or in equity or other proceeding against the said Home Owners Insurance Company or the Director of Insurance of the State of Illinois, or from in any way interfering with the Director of Insurance in his possession or control of the porperty, books, records and all other assets of the said Home Owners Insurance Company.

(e) That all claimants, policyholders and creditors of Home Owners Insurance Company be and hereby are enjoined and restrained from asserting any claim against the Liquidator except in the liquidation proceedings of Home Owners Insurance Company.

(f) That all persons, including policyholders of Home Owners Insurance Company and all persons asserting claims against such policyholders be and are hereby rest. ed and enjoined from instituting or pursuing any action or proceeding in any court or before any administrative agency, including boards and commissions administering Workmens Compensation or occupational diseases or similar laws of the State of Illinois or of any other State or of the United States, which seeks in any way, directly or indirectly to contest or interfere with the Liquidator's exclusive right, title and interest to funds recoverable under treaties and agreements of reinsurance heretofore entered into by Home Owners Insurance Company, as the ceding insurer.

(g) That all policies and bonds of Home Owners Insurance Company be and are hereby cancelled effective 12:01 A. M., April 19, 1971.

(h) That the business of liquidation may be conducted in the City of Chicago, Illinois, at the Bureau of Liquidations, 173 West Madison, Chicago, Illinois.

(i) That Home Owners Insurance Company is hereby dissolved and its Charter and Certificate of Authority are null and void of no effect whatsoever.

(j) That hereafter the caption of this cause and all pleadings in this matter shall read as:

(k) That this Honorable Court shall retain jurisdiction of this cause for the purpose of granting such other and further relief as the policyholders and creditors may require.

Enter:

/s/ WILLIAM H. CHAMBERLAIN

Judge

Dated April 8, 1971.